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<b>NANCY J. BOWMAN, Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 05-782</b>
	)	<b>Issued: July 26, 2005</b>
<b>DEPARTMENT OF THE TREASURY,</b>	)	
<b>INTERNAL REVENUE SERVICE, Beckley, WV,</b>	)	
<b>Employer</b>	)	
	)	

Nancy J. Bowman, pro se  
Office of Solicitor, for the Director

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

On February 17, 2005 appellant filed a timely appeal of the January 12, 2005 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration and the Office's September 17, 2004 merit decision denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim and the nonmerit issue.

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On December 29, 2003 appellant, then a 60-year-old human resource specialist, filed an occupational disease claim alleging that she developed a stress or a psychiatric condition on January 28, 2003 which she attributed to a situation with Teresa Carter, her new manager. She first became aware of her condition in April 2001. In a January 29, 2003 statement, appellant advised that since April 2001, when Ms. Carter came to the office, there had been stress and turmoil at work. Appellant stated that she had a personality conflict with Ms. Carter that had been accelerating over the past few years. Appellant stated that her work was constantly reviewed and the manner in which it was handled caused her emotional stress that interfered in her ability to do her work and which resulted in an unsatisfactory performance evaluation.

In a March 5, 2004 letter, the employing establishment controverted the claim and submitted a statement from Ms. Carter, who denied having a personality conflict with appellant. She noted that appellant had been unwilling to work with management. Ms. Carter stated that appellant was given specific instructions, guidance and requests for improvement for a period of nearly three years for performance issues that included work habits, work products and managerial complaints. She noted that appellant did not take personal responsibility for her actions, behavior, conduct, work product or overall performance. Ms. Carter related that formal work reviews had not been accomplished since the inception of the branch in the fall of 1995 and, when such reviews began in June 2001, appellant and another employee became upset. Ms. Carter related that appellant had many opportunities to improve but displayed an unusual amount of difficulty in adapting to change. Specific examples of disciplinary actions taken were noted along with reasons for appellant's performance evaluations. Ms. Carter stated that appellant had no more reviews than other staff members until she was placed on a Performance Improvement Plan (PIP) in the spring and summer of 2003, which appellant failed to successfully complete despite being extended for two 60-day periods. Ms. Carter noted that, beginning with appellant's 30-day suspension, appellant allowed her assigned work to pile up so that colleagues would complete it for her during her absences. When appellant returned to a work status following suspension, she was unmotivated to be productive. Ms. Carter indicated that appellant was given a proposal of removal letter on December 9, 2003 took a half day of sick leave on December 10, 2003 and began an extended period of sick leave on December 11, 2003. Ms. Carter noted that an organizational development consultant was brought in during the tenure of another manager to resolve disputes with employees but, after a couple of interventions, the employing establishment believed that the counselor had accomplished all that he could. Copies of documents supporting Ms. Carter's statements were also submitted.

By letter dated April 21, 2004, the Office advised appellant that the information she submitted was insufficient to establish her claim. The Office requested additional factual and medical information from appellant and afforded her 30 days in which to submit such information.

In an April 29, 2004 response, appellant answered the Office's questions pertaining to her emotional condition and submitted medical reports, psychiatric reports, hospital and administrative records. In a duty status report of April 13, 2004 a physician, whose signature is illegible but who was noted to be a counselor in psychology, opined, with a check mark, that appellant's adjustment disorder and major depressive disorder corresponded to the history

provided by appellant and opined that interpersonal relations were affected. In reports dated December 12, 2003 to March 19, 2004, Dr. M. Khalid Hasin, a psychiatrist, noted that appellant complained of problems at work that started with a new boss. Appellant felt like she was being persecuted and discriminated against at work. Major depression, recurrent and adjustment disorder with anxious and depressed mood secondary to situation factors and physical illness were diagnosed. In a March 2, 2004 report, Dr. Richard L. Metrick, Ph.D, a clinical psychologist, noted that appellant's intake session reflected vocational stress and anxiety, with feelings of depression secondary to interpersonal conflict, perceived harassment and unnecessary confrontations with her immediate supervisor, Ms. Carter. Appellant was diagnosed with chronic major depression, single episode with vocational stress and poor relationship with supervisor as factors.

In a decision dated September 17, 2004, the Office denied appellant's claim on the basis that she failed to establish an injury in the performance of duty as she had not established her condition to a compensable factor of employment.

In an October 7, 2004 letter, appellant requested reconsideration of the Office's September 17, 2004 decision. Submitted were a copy of Dr. Hasin's March 19, 2004 report, previously of record and a July 6, 2004 favorable decision from the West Virginia Bureau of Employment Programs finding that appellant was compelled to leave her job for health-related reasons and that her work aggravated, worsened or would worsen her health. In a June 29, 2004 medical report, Dr. Metrick opined that the severity of appellant's depression and acute anxiety rendered her unable to work under the supervision of Ms. Carter. He further advised that appellant was compelled to retire or leave her work for her own health-related reasons in order to keep her health insurance, life insurance and retirement benefits. He further opined that appellant's workload and her manager aggravated and would continue to aggravate appellant's health problems.

By decision dated January 12, 2005, the Office denied appellant's request for reconsideration finding that she failed to submit either new and relevant evidence or legal contentions not previously considered.

### **LEGAL PRECEDENT -- ISSUE 1**

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>1</sup> On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>2</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.<sup>3</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative or personnel matter, coverage will be afforded.<sup>4</sup> In determining whether the employing establishment erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>5</sup>

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>6</sup> A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>7</sup> The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.<sup>8</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>9</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>10</sup>

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<sup>3</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon*, 42 ECAB 556 (1991).

<sup>4</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>5</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>6</sup> See *Michael Ewanichak*, 48 ECAB 364 (1997).

<sup>7</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>8</sup> *Beverly R. Jones*, 55 ECAB \_\_\_\_ (Docket No. 03-1210, issued March 26, 2004).

<sup>9</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>10</sup> *Id.*

### ANALYSIS -- ISSUE 1

Appellant alleged that since Ms. Carter became her manager, in April 2001, there had been a personality conflict between the two that resulted in stress and turmoil in the office. However, the Board has long held that an employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.<sup>11</sup>

Appellant claimed that her work was constantly reviewed and the way the work was being handled caused extreme stress, which interfered with her ability to work. The Board has held that emotional reactions to situations, in which an employee is trying to meet her position requirements are compensable.<sup>12</sup> Appellant, however, has not specifically alleged that her emotional condition was aggravated by the requirements of her work. Ms. Carter noted monitoring appellant's work and implementing plans to assist appellant in improving her job performance. Although appellant alleged that the way the work was managed interfered with her ability to work, the record is devoid of any evidence that appellant could not meet or attributed her emotional reaction to trying to meet her position requirements. The monitoring of an employee's activities at work by a supervisor relates to administrative or personnel matters unrelated to the employee's regular or specially assigned work duties. Such actions do not fall within the coverage of the Act unless the evidence discloses error or abuse by employing establishment personnel.<sup>13</sup> The Board finds no such error or abuse by the employing establishment or Ms. Carter in monitoring appellant's work and taking actions to improve her performance as the actions taken by Ms. Carter seem reasonable under the circumstances presented and as appellant has not submitted any evidence to corroborate her assertions that Ms. Carter acted improperly. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also stated that her condition has interfered with her ability to work, therefore causing her job performance to be rated as unsatisfactory. She also made a general allegation that she felt harassed and discriminated at work, but did not give specific examples of such harassment. The record reflects that appellant was placed on PIP, which were unsuccessful, denied a within grade increase, was given a proposal of removal letter and took an extended amount of accrued sick leave prior to retiring from the employing establishment on disability. To the extent that appellant is alleging that those actions contributed to her medical condition, the Board finds that such actions are administrative actions and therefore are not, by themselves, compensable factors of employment.<sup>14</sup> Appellant therefore must establish that the disciplinary actions were taken in error or abusively. Appellant, however, has offered no evidence to support that any of the disciplinary actions taken were in error or abusively and has offered no evidence

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<sup>11</sup> See *Dennis J. Balogh*, *supra* note 9; *William P. George*, 43 ECAB 1159 (1992).

<sup>12</sup> *Donna J. Dibernardo*, 47 ECAB 700 (1996); *Joseph A. Antal*, 34 ECAB 608 (1983).

<sup>13</sup> See *Dennis J. Balogh*, *supra* note 9; *John Polito*, 50 ECAB 347 (1999). The Board has characterized criticisms of performance, supervisory discussions of job performance and reprimands as administrative or personnel matters of the employing establishment, which are covered only when a showing of error or abuse is made. *Roger W. Robinson*, 54 ECAB \_\_\_\_ (Docket No. 03-348, issued September 30, 2003).

<sup>14</sup> See generally *Effie O. Morris*, 44 ECAB 470 (1993).

to support her claim of harassment. The employing establishment, however, indicated that such actions were taken due to appellant's poor work performance and provided specific examples of appellant's behavior that gave rise to the discipline. Appellant has not submitted any evidence corroborating any allegations of error or abuse in the disciplinary actions or that such disciplinary actions were a form of harassment.

Regarding harassment, as noted above, unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Appellant has expressed her own perception of her situation but she has not submitted any probative evidence to support any allegations of harassment or discrimination. Therefore, she has not established that harassment occurred or that such actions constituted harassment. Thus, appellant has not established a compensable employment factor under the Act in this respect.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and therefore has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.<sup>15</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>16</sup> Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's October 7, 2004 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(2).<sup>18</sup>

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted medical evidence from Dr. Hasin which was previously of record. The Board has held that the submission of evidence which

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<sup>15</sup> As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 503-04 (1992).

<sup>16</sup> 20 C.F.R. § 10.606(b)(2).

<sup>17</sup> 20 C.F.R. § 10.608(b).

<sup>18</sup> 20 C.F.R. §§ 10.608(b)(2)(i) and (ii).

repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.<sup>19</sup> Dr. Metrick's June 29, 2004 report, although new evidence, is not relevant to the underlying issue of whether appellant has established compensable employment factors involving her claim. Furthermore, the Board has held that a finding of a state administrative agency is not determinative of the extent of physical disability or impairment for compensation purposes under the Act.<sup>20</sup> The decision from the West Virginia Bureau of Employment Programs, apparently with regard to appellant's claim for unemployment benefits, is not pertinent or relevant to appellant's claim. As appellant did not submit any "relevant and pertinent new evidence," she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).<sup>21</sup>

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty and properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

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<sup>19</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

<sup>20</sup> *James E. Norris*, 52 ECAB 93, 103 (2000).

<sup>21</sup> 20 C.F.R. § 10.608(b)(2)(iii).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 12, 2005 and September 17, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 26, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board